

This is a claim for a July 28, 2003, accident and bilateral lower extremity injuries. In the February 22, 2007, Award, Judge Fuller found claimant sustained impairment to his right lower extremity only. Persuaded by the opinions of the court-ordered independent medical examiner, the Judge awarded claimant permanent disability benefits under K.S.A. 44-510d for a 47 percent disability to the right lower extremity.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability. Claimant contends he sustained impairment to both lower extremities as a result of his July 28, 2003, accident and, therefore, the Award should be modified. Conversely, respondent contends claimant sustained impairment to only one ankle and, therefore, the Award should be affirmed. Both claimant and respondent agree the *Casco*<sup>1</sup> decision controls and they also agree claimant's permanent partial disability benefits should be computed under the schedules of K.S.A. 44-510d. Claimant did not argue that he was permanently and totally disabled.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be affirmed.

There is no dispute that claimant injured his right ankle and foot on July 28, 2003, when he fell from a roof while working as a lineman for respondent. Moreover, the parties agree claimant's accident arose out of and in the course of his employment with respondent. But the parties disagree whether claimant also sustained or developed an impairment in his left foot or ankle as a result of the July 28, 2003, accident.

The fall from the roof fractured the calcaneous (heel bone) in claimant's right foot. Four surgeries later, including a right ankle fusion, claimant no longer works for respondent or anyone else. Instead, claimant draws Kansas Public Employees Retirement System (KPERS) disability benefits. At the time of the September 2006 regular hearing, claimant had also applied for Social Security disability benefits.

Dr. Rajesh Bazaz, who is a board-certified orthopedic surgeon, saw claimant after two other doctors who had treated claimant left their medical group. The doctor subspecializes in arthroscopic surgery, shoulders, knees, hips and ankles. After examining claimant in November 2005 and April 2006, Dr. Bazaz determined claimant had a 40 percent impairment to his right lower extremity, or 57 percent impairment to the foot, under the fourth edition of the *AMA Guides*<sup>2</sup> due to the lost motion from the fused subtalar joint and a sural nerve deficit. Likewise, the doctor determined claimant had a 5 percent impairment to his left lower extremity due to decreased range of motion in the hind foot. According to Dr. Bazaz, the impairment in claimant's left lower extremity occurred because of the altered gait that claimant developed following the July 2003 accident.

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<sup>1</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

This injury has limited claimant's ability to work. Dr. Bazaz believes claimant will need to use some type of orthotic device for his right foot and that he will have problems with walking for prolonged periods, climbing, standing and stooping. The doctor believes that claimant should limit his standing to about one hour and similarly limit his walking to about 50 yards per occurrence.

Claimant is probably the only person Dr. Bazaz has rated under the fourth edition of the AMA *Guides*. Moreover, the doctor was not certain whether the *Guides* require a person to be lying down or standing up when measuring the heel valgus. And in this instance, the method utilized affects the ultimate impairment rating.

In January 2006, board-certified neurological surgeon Dr. Paul S. Stein examined claimant at Judge Fuller's request. The doctor examined claimant a second time in August 2006. Based upon his evaluation, Dr. Stein found claimant had a 47 percent impairment to his right lower extremity under the fourth edition of the AMA *Guides* but no impairment in his left foot or ankle. Although the doctor did not dispute that claimant may be experiencing pain in his left foot due to his altered gait, Dr. Stein did not believe claimant had an impairment for that symptom as there was no objective basis, such as loss of range of motion or any structural change in his foot.

At his attorney's request, claimant was evaluated by vocational rehabilitation counselor Monty Longacre regarding any task loss or wage loss claimant may have sustained as a result of the July 2003 accident. As part of that evaluation, Mr. Longacre determined claimant retained the ability to earn \$240 per week in the open labor market considering the restrictions of Dr. Bazaz. Mr. Longacre also created a list of former work tasks that claimant performed in the 15-year period before his accident. But those tasks are no longer relevant due to the recent *Casco*<sup>3</sup> decision, which held that injuries to parallel limbs no longer qualify a worker to receive permanent partial general disability benefits under K.S.A. 44-510e.

Like the Judge, the Board is persuaded by Dr. Stein's expert medical opinions. Accordingly, the Board affirms the Judge's finding that claimant injured his right lower extremity in the July 2003 accident that has resulted in a 47 percent impairment to his right lower extremity. In addition, the Board adopts Dr. Stein's opinion that claimant does not have a left lower extremity impairment under the fourth edition of the *Guides*.

The Board concludes claimant is not permanently and totally disabled as he retains the ability to earn \$240 per week in the open labor market as indicated by his vocational rehabilitation expert. Consequently, claimant is entitled to receive permanent disability

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<sup>3</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

benefits under the schedules of K.S.A. 44-510d for a 47 percent impairment to his right lower extremity. In short, the February 22, 2007, Award should be affirmed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>4</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, the Board affirms the February 22, 2007, Award entered by Judge Fuller.

The record does not contain a written fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee in this matter, counsel must submit the written agreement to the Judge for approval.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant  
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier  
Pamela J. Fuller, Administrative Law Judge

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<sup>4</sup> K.S.A. 2006 Supp. 44-555c(k).